Office of Chief Counsel
Internal Revenue Service

memorandum

CC:[redacted]:TL-N-2123-99
[redacted]

date:

to: District Director, [redacted] District
ATTN: Chief, Examination Division
(Group Manager [redacted])

from: District Counsel, [redacted] (CC:[redacted])

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subject: [redacted]
Forms 872 - Taxable Year ending December 31, [redacted]
Taxable Year ending [redacted]
Consents to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [redacted]

UIL Nos. 6501.08-00, 6501.08-17, 6901.03-01

DISCLOSURE STATEMENT

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By memorandum dated July 13, 1999, we provided you with advice as to the proper party to execute extensions of the statutes of limitations on assessment with respect to the above-captioned taxpayer, how such extensions should be captioned, and whether transferee liability would apply in this case. In our Memorandum, we concluded that the taxpayer was the proper party to execute a consent, that such consent should be captioned using the taxpayer's name and that The [redacted] and [redacted] ("[redacted]") were transferees of the taxpayer.

On August 2, 1999, of your office and of our office met with the taxpayer's representatives to discuss, among other things, the conclusions reached in our July 13, 1999 Memorandum. At the meeting, the taxpayer's representatives provided additional new information with regard to the relationship between the taxpayer and .

According to the representatives, 's was established by The for the *sole* purpose of providing services for it and for the taxpayer. In fact, the representatives pointed out that was established only as the result of an Order of the , dated ("), which authorized the "... to establish and maintain an office in the United States, at which no business is conducted, solely for the purpose of (a) administering any books and records that or the may be required to maintain in pursuant to any other judicial or legal requirements ... [and] (b) administering the s ongoing affairs with federal, state and local taxing authorities and regulatory bodies ..."

In light of this new information, please be advised that we have revised the conclusion we reached in our July 13, 1999 Memorandum as to the relationship between the taxpayer and . In that memorandum, we concluded that was a transferee of the taxpayer based upon our reading of the Amended and Restated Servicing Agreement. Now that we have re-reviewed the Amended and Restated Servicing Agreement, together with the new information provided by the taxpayer, we find that is in fact ***NOT*** a transferee of the taxpayer.

The authorized to provide *only services* for the taxpayer and for The The did not authorize to assume any of the taxpayer's liabilities. In the Amended and Restated Servicing Agreement agreed to *pay* the taxpayer's income tax liabilities. This was merely an agreement to make actual physical payment of the liabilities, since the taxpayer, itself, could not make any payments as it was forbidden from operating in the United States. did not agree to assume the taxpayer's income tax liabilities under the terms of the Amended and Restated Servicing Agreement. In fact, it would be impossible for to have agreed to assume any of the taxpayer's income tax liabilities, since it was only authorized by the to provide services for the taxpayer.

In view of the above, we conclude that [redacted] is not a transferee of the taxpayer. Accordingly, [redacted] need not execute Forms 2045 and 977, acknowledging any such relationship with the taxpayer and extending any statute of limitations relating thereto.

It should be noted that our revised determination herein has no impact upon the advice we previously rendered in our July 13, 1999 Memorandum with regard to the execution of the Form 872 for the taxpayer, the caption to appear on such consent, and our determination that the [redacted] is a transferee of the taxpayer. For your convenience, we are attaching a copy of our July 13, 1999 Memorandum.

Should you have any questions regarding this matter, please contact [redacted] of this office at [redacted], extension [redacted].

[redacted]
District Counsel

By: [redacted]
Assistant District Counsel

Noted:

[redacted]
District Counsel

cc: [redacted] (by e-mail)
Assistant Regional Counsel (TL)

[redacted] (by e-mail)
Assistant Regional Counsel (LC)

[redacted] (by e-mail)
Assistant Regional Counsel (LC)

[redacted]
Assistant District Counsel

[redacted]
Assistant District Counsel

Office of Chief Counsel
Internal Revenue Service

memorandum

CC: [redacted]:TL-N-2123-99
[redacted]

date:

to: District Director, [redacted] District
ATTN: Chief, Examination Division
(Group Manager [redacted])

from: District Counsel, [redacted] (CC:[redacted])

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subject: [redacted]
Forms 872 - Taxable Year ending December 31, [redacted]
Taxable Year ending [redacted]
Consents to Extend the Statute of Limitations on Assessment

STATUTE OF LIMITATIONS EXPIRES [redacted]

UIL Nos. 6501.08-00, 6501.08-17, 6901.03-01

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We write in response to your request for advice in the above-captioned matter. Specifically, you have requested advice as to the proper party to execute extensions of the statutes of limitations on assessment with respect to the above-captioned taxpayer and how such extensions should be captioned. You have also inquired whether transferee liability would apply in this case.

Issues

1. Which entity is the proper entity to enter into consents to extend the statute of limitations on assessment with respect to the taxpayer's taxable years ending December 31, [redacted] and [redacted].

2. How should such consents be captioned.

3. Whether any other entities are liable as transferees for the taxpayer's income tax liabilities for the taxable years ending December 31, [redacted] and [redacted].

4. Whether the Power of Attorney executed by the [redacted] is valid for the purpose of authorizing a representative to act on its behalf with respect to certain tax matters.

Facts

The [redacted] ("[redacted]") is a [redacted] organized under the laws of [redacted]. [redacted] engaged in [redacted] in the United States through various [redacted] and through the taxpayer, the [redacted] (E.I.N. [redacted]). The [redacted] was organized on [redacted] under the laws of [redacted] and is a wholly owned subsidiary of [redacted].

In [redacted], a scandal broke involving the unauthorized [redacted] in [redacted]'s [redacted] and the subsequent cover-up by [redacted] of over $[redacted] in losses from such [redacted]. As a result of the scandal, [redacted] and the [redacted] were ordered by various state and federal [redacted] authorities to terminate their [redacted] in the United States by [redacted]. [redacted] and the [redacted] were permitted, however, to establish and maintain an office in the United States solely for the purpose of administering their ongoing affairs, including the administration of [redacted]'s and the [redacted] ongoing affairs with federal, state and local taxing authorities and regulatory bodies.

By a [redacted], dated [redacted], [redacted] agreed to assume and undertake to discharge, perform and pay all the debts, liabilities, and obligations of [redacted], including, without limitations, debts related to unpaid tax obligations. The [redacted] was signed by [redacted] and acknowledged by the [redacted].

On [redacted], in accordance with the above-mentioned [redacted], [redacted] entered into a Servicing Agreement with

[redacted] ("[redacted]") to administer its ongoing affairs, including its ongoing affairs with federal, state and local taxing authorities and regulatory bodies. In furtherance of this agreement, [redacted] executed a power of attorney authorizing [redacted] to act on its behalf in certain matters including [redacted]'s ongoing federal, state and local tax affairs.

On or about [redacted], the [redacted] was dissolved and its remaining assets were distributed to [redacted]. By Amended and Restated Servicing Agreement ("Amended Agreement"), dated as of [redacted], [redacted] and [redacted] agreed to amend and restate the Servicing Agreement to include certain services with respect to matters relating to or arising from the dissolution of the [redacted] Included in these services were "the monitoring and the taking of appropriate action on behalf of [redacted] with respect to *administering of ... ongoing affairs and other matters with* federal, state and local taxing authorities and regulatory bodies" and the "mak[ing] of prompt and complete payment of all [redacted]'s liabilities and obligations related to certain unpaid tax liabilities ... assumed by [redacted] from [redacted] and any other liabilities and obligations arising under the Letter of Undertaking and administ[ration of] all matters relating thereto."

Discussion

In general, the statute of limitations on assessment expires three years from the date the tax return for such tax is filed. I.R.C. § 6501(a). Section 6501(c)(4), however, provided an exception to the general three year statute of limitations on assessment. In accordance with this exception, the Secretary and the taxpayer may consent in writing to an agreement to extend the statute of limitations on assessment. For income taxes, the form used by the Service to extend the limitations period on assessment is Form 872 (Consent to Extend the Time to Assess Tax).

Pursuant to I.R.C. § 6061, any return, statement, or other document made under any internal revenue law must be signed in accordance with the applicable forms or regulations. However, the regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed under this section. Accordingly, the Service has applied the rules applicable to the execution of returns to the execution of consents to extend the statute of limitations on assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax return shall be signed by the

president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. Accordingly, such specified individuals may sign consents to extend the statute of limitations on assessment. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. In the case of a dissolved corporation, state law must be examined to determine who has authority to execute a consent on behalf of the dissolved corporation. Rev. Rul. 83-41, 1983-1 C.B. 349, See also Sanderling, Inc. v. Commissioner, 66 T.C. 743, 750 (1976), *affirmed* 571 F.2d 174 (3rd Cir. 1978).

[redacted]

The [redacted] also provides for a winding up period in the case of a dissolved bank. [redacted]. Accordingly, any authorized officer of a corporation may sign a consent during the period which the corporation continues in existence for the purpose of winding up its affairs. Rev. Rul. 83-41. Moreover, such authority may be delegated to an agent. Jaffee v. Commissioner, 45 F.2d 679 (2nd Cir. 1930).

Pursuant to the Treasury Regulations, a power of attorney is required in order to authorize a representative to execute a consent to extend the statute of limitations on behalf of a taxpayer. Treas. Reg. § 601.504(a). The regulations define a "power of attorney" as a document signed by the taxpayer, as principal, appointing an individual as attorney-in-fact to perform certain specified act(s) on behalf of the principal. Treas. Reg. § 601.501(b)(9). An attorney-in-fact is defined as an agent authorized by the principal under a power of attorney. Treas. Reg. § 601.501(b)(1).

In the subject case, we have been provided with a [redacted] written by [redacted] and acknowledged by The [redacted] by which [redacted] agreed to assume and undertake to discharge, perform and pay all the debts, liabilities, and obligations of [redacted], including, without limitations, debts related to certain unpaid tax liabilities. Although [redacted] agreed to

obligate itself with respect to the [redacted]'s liabilities and obligations, the [redacted] does not arise to the level of a power of attorney. It is merely a unilateral statement of what [redacted] obligated itself to do on behalf of the [redacted]. Moreover, [redacted] is not appointed by the [redacted] as its attorney-in-fact or agent by the [redacted].

In addition, we have been provided with a Servicing Agreement and the Amended Agreement. Pursuant to the Servicing Agreement [redacted] agreed to undertake certain of [redacted]'s obligations, including the administration of [redacted]'s ongoing tax affairs. In connection with this agreement, [redacted] also executed a power of attorney appointing [redacted] as its attorney-in-fact.

In the Amended Agreement, [redacted] reaffirmed it agreement to undertake certain of [redacted]'s obligations, including the administration of its tax matters.[1] In addition, [redacted] agreed to undertake certain obligations of the [redacted], including the [redacted]'s tax matters which [redacted] had agreed to undertake pursuant to the [redacted].

In our view, neither the Servicing Agreement nor the Amended Agreement amount to valid powers of attorney which would have the effect of appointing [redacted] as the attorney-in-fact for the [redacted] with respect to its tax affairs. Since [redacted] does not have a valid power of attorney from the [redacted] with respect to the [redacted]'s tax affairs, it cannot validly appoint another as its agent to carry out its obligations for the tax affairs of the [redacted].

In light of the above, neither [redacted] nor [redacted], as [redacted]'s attorney-in-fact under a power of attorney, can execute a Form 872 on behalf of the [redacted] because there is no acceptable delegation of authority to do so under the regulations. But since the [redacted] is still in existence for the purpose of winding up its business affairs, in particular its tax affairs,

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[1] At paragraph 1.3 of the Amended Agreement, [redacted] authorized [redacted] to take such actions on behalf of [redacted] as are necessary in connection with performing services, obligations and undertakings. To this end, a power of attorney is purportedly attached to the Amended Agreement as as an exhibit. There is no power of attorney attached as an exhibit to the copy of the Amended Agreement given to Service by [redacted]'s representatives. Counsel inquired of [redacted]'s representatives, however, and was advised that the power of attorney attached to the Amended Agreement as an exhibit is the same power of attorney that had been previously executed in connection with the Servicing Agreement and attached thereto as an exhibit.

any individual in the [redacted] holding the position of president, vice-president, treasurer, assistant treasurer, chief accounting officer, or any other officer duly authorized to act, can execute a Form 872, or can authorize, under a valid Power of Attorney (Form 2848), a representative to execute a Form 872 on its behalf. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

Any Form 872 executed in accordance with the above would simply be captioned "[redacted]" and would include the [redacted] EIN in the upper right hand corner of the consent.

Transferee Liability

Section 6901(a) provides a procedure by which the Service may collect taxes from a transferee of property who is liable at law or equity for the taxes of the transferor. Transferee liability at law may be established through the existence of an agreement in which one party agrees to assume the liabilities of the other party. See Southern Pacific v. Commissioner, 84 T.C. 387, 394, later proceeding, 90 T.C. 771 (1988). Applicable state statutes may also impose primary liability on that party. See id. Primary liability and transferee (secondary) liability may co-exist. See id.

As set forth above, [redacted] dissolved under the provisions of [redacted] law. Since the existence of a corporation continues for the purposes of winding up its affairs, liability for the debts and obligations of the corporation do not pass to another entity by statute. Accordingly, neither [redacted] nor [redacted] are primarily liable for the [redacted]'s liabilities and obligations under [redacted] law. However, since [redacted] agreed to assume the debts, liabilities and obligations of the [redacted], pursuant to the [redacted], [redacted] is liable for the [redacted]'s income tax liabilities as a transferee. Moreover, since [redacted] agreed to assume the obligations and liabilities of the [redacted], which [redacted] had agreed to assume and undertake pursuant to the [redacted], [redacted] is also liable for the [redacted]'s income tax liabilities as a transferee at law.

Section 6902(a) of the Internal Revenue Code places the burden of proving transferee liability on the Service. Accordingly, Forms 2045 (Transferee Agreement), acknowledging that [redacted] and [redacted] are transferees of the [redacted], should be executed by [redacted] should execute two Forms 2045; one on its own behalf and one on behalf of [redacted], as attorney-in-fact under a power of attorney.

In addition, section 6901(d) provides that the transferee

liability statute can be extended by agreement. Accordingly, [redacted] should also execute two Forms 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift, and Estate Tax Liability Against a Transferee or Fiduciary); one on its own behalf and one on behalf of [redacted], as attorney-in-fact under a power of attorney.

Power of Attorney

The Treasury Regulations do not require that a power of attorney be submitted on a special IRS Form 2848 - Power of Attorney and Declaration of Representative. The power of attorney submitted, however, must set forth the following:

(1) the name and mailing address of the taxpayer;
(2) tax identification number of the taxpayer;
(3) name and mailing address of the recognized representative(s)
(4) description of the matter(s) for which representation is authorized which, if applicable, must include the type of tax involved, the federal tax form number, and the specific year(s)/period(s) involved; and
(5) a clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representative(s). Treas. Reg. § 601.503(a).

In addition, the representative must make a written declaration in conformity with Treas. Reg. § 601.502(c). The requirements of Treas. Reg. §§ 601.502(c) and 601.503(a) are satisfied by a properly completed Form 2848. Treas. Reg. § 601.503(b)(1).

However, if a power of attorney fails to include some or all of the above information required by Treas. Reg. §§ 601.502(c) and 601.503(a), the attorney-in-fact can cure this defect by executing a Form 2848 (on behalf of the taxpayer) which includes the missing information. Treas. Reg. § 601.503(b)(3). Attaching a Form 2848 to a copy of the original power of attorney will validate the original power of attorney (and will be treated in all circumstances as one signed and filed by the taxpayer) provided the following conditions are satisfied:

(i) The original power of attorney contemplates authorization to handle, among other things, Federal tax matters (e.g., the power of attorney contains language to the effect that the attorney-in-fact has the authority to perform any and all acts).

(ii) The attorney-in-fact attaches a statement (signed under penalty of perjury) to the Form 2848 which states that the

original power of attorney is valid under the laws of the governing jurisdiction. Treas. Reg. §601.503(b)(3)(i)-(ii).

As discussed above, [redacted] executed a power of attorney appointing [redacted] of [redacted] or [redacted] of [redacted] as attorney-in-fact to act in its name in connection with certain specified matters, including the administration of ongoing affairs and other matters with federal, state and local taxing authorities and regulatory bodies. While the above cited regulations appear to apply only to **taxpayer** representatives, we believe it would be prudent to treat [redacted], as a representative of a transferee, in the same fashion. Accordingly, the power of attorney appointing [redacted] as [redacted]'s attorney-in-fact is not effective, on its own, to delegate to [redacted] the authority to sign Forms 2045 and 977 on [redacted]'s behalf, since it does not contain all the information required by Treas. Reg. § 601.503(a). The power of attorney, however, clearly contemplates authorization to handle Federal tax matters, in conformity with Teas. Reg. § 601.503(b)(3)(i). Accordingly, if the following is attached to a copy of the power of attorney, it <u>will</u> be effective under Treas Reg. § 601.503(b)(3):

(1) A completed Form 2848 signed by the attorney-in-fact on behalf of [redacted].

(2) A statement (signed under penalty of perjury by the attorney-in-fact) which states that the original power of attorney is valid under the laws of the governing jurisdiction.

Should you have any questions regarding this matter, please contact [redacted] of this office at [redacted].

[redacted]
District Counsel

By: _____
[redacted]
Assistant District Counsel

Noted:

[redacted]
District Counsel

cc: [redacted] (by e-mail)
Assistant Regional Counsel (TL)

[redacted] (by e-mail)
Assistant Regional Counsel (LC)

[redacted] (by e-mail)
Assistant Regional Counsel (LC)

[redacted]
Assistant District Counsel

[redacted]
Assistant District Counsel